

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID E. HART

Claimant

VS.

BOTT FAMILY FARMS

Respondent

AND

UTICA NATIONAL INS. CO. OF TX

Insurance Carrier

Docket No. 1,002,139

ORDER

Respondent and its insurance carrier request review of the January 29, 2007 Award by Administrative Law Judge Bryce D. Benedict. Both parties submitted briefs and the case was placed on the Board's summary docket on May 2, 2007, for decision without oral argument.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Vaughn Burkholder of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a 24.9 percent work disability based upon a 49.8 percent wage loss and a 0 percent task loss.

The respondent requests review of the nature and extent of disability. Respondent argues the claimant has failed to meet his burden of proof that he sustained any permanent impairment. Respondent argues claimant returned to work without restrictions

making a comparable wage after his injury. Respondent further argues claimant did not suffer a functional impairment but in any event did not establish a functional impairment greater than 3 percent.

Claimant contends he is permanently and totally disabled from earning substantial and gainful employment due to his physical and psychological injuries. In the alternative, the claimant argues he is entitled to a 84.5 percent work disability based upon a 100 percent wage and 69 percent task loss as well as future medical treatment. Claimant further argues the average weekly wage does not include the amount of the discontinued employer provided health insurance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets forth findings of fact which summarizes the record in some detail. It is not necessary to repeat those facts herein. The Board adopts the ALJ's findings of fact as its own with the exception that the Board concludes the claimant failed to meet his burden of proof to establish he suffered any permanent impairment.

Briefly summarized, on September 5, 2000, claimant was standing in some water, reached up to turn on an electrical switch with his right hand and his left hand was on levers to operate a chute. When claimant turned the switch on he received an electrical shock. Claimant was transported by ambulance to Clay County Medical Center in Clay Center, Kansas, and then later transferred to Salina Regional Medical Center in Salina, Kansas. An MRI and EEG performed during claimant's hospitalization were both normal and did not reveal spinal cord damage.

The claimant was provided treatment including physical therapy and was ultimately released by the primary treating physician, Dr. William D. Kossow. During treatment the claimant had been released to light duty and returned to work for respondent for a few months. Claimant testified that he returned to work for the respondent part-time from April to June 2001. His job duties were driving a grain truck rather than his normal job of animal care.

The claimant did return to work for respondent but eventually quit. As the ALJ noted in his Award the claimant gave differing versions of why he quit, either because of ongoing pain or because there was no work for him within his restrictions.

The record is replete with inconsistencies where claimant would testify regarding his activities and the information he provided the medical providers would contain contradictory information. As an example Dr. Kossow was told claimant returned to work doing his

normal duties as opposed to a return to light-duty work driving a grain truck. And the claimant apparently received treatment including narcotic pain medication from Dr. Kent Erickson, his personal physician, at the same time he was receiving treatment from Dr. Kossow.

On July 18, 2001, Dr. Kossow had released claimant with restrictions. But after viewing a videotape which depicted claimant walking normally without any balance problems in December 2001, Dr. Kossow determined claimant no longer required restrictions as of December 21, 2001.

Claimant went to the emergency room in January 2002 after an alleged seizure but EEG testing did not confirm that claimant had suffered a seizure. And several doctors later opined that this incident was likely triggered by withdrawal symptoms due to claimant not taking his medications. Claimant continued to seek narcotic pain medications either from his personal physician or from hospital emergency room visits.

Although not mentioned by claimant in any of his testimony, in his personal physician's records there is a history that in approximately July 2002, claimant returned to the same type of work he had performed for respondent. Claimant told Dr. Erickson he worked for two weeks with a cattle operation in Texas but that he quit because he worked 84 hours a week instead of the promised 40 hours a week and his back pain became intolerable. It was further noted claimant had been using less medication before this work and was now using more.

Claimant then received vocational training through SRS at Fort Scott Community College for truck driving. Again, the record is not helpful in determining exactly when this training occurred. After completion of the truck driving course and obtaining his commercial drivers license, claimant obtained employment hauling livestock which included cross country trips. Claimant worked approximately eight months and then quit. As noted by the ALJ, the claimant stated he quit because of his doctor's recommendation although the medical record does not support this claim. In fact the medical records indicate an incident occurred in Phoenix, Arizona, where law enforcement removed claimant from his truck and claimant was hospitalized. Another version indicates claimant was in an altercation and was struck in the head with a flashlight. Claimant testified it became too painful to drive so he finally quit. Claimant has not worked since nor has he looked for work.

Dr. John P. Devine examined and evaluated the claimant on May 6, 2004, due to complaints of incontinence and impotence. A urodynamics study was performed on June 2, 2004, which revealed uninhibited contractions or bladder spasms. Dr. Devine prescribed medication for both the incontinence and impotence problems. On September 23, 2004, the doctor noted claimant was doing much better with regard to the impotence but was still having problems with urge incontinence. On October 20, 2004, Dr. Devine discussed the possibility of undergoing a bladder augmentation (increase bladder capacity

with bowel or intestine) with the claimant as an option. Ultimately, the ileocystoplasty (bladder augmentation) was performed on March 31, 2005. Dr. Devine opined that he did not have an opinion within a reasonable degree of medical probability as to the cause for either claimant's incontinence or impotence.

Claimant later enrolled at Cloud Community College in Concordia, Kansas, but was not successful in completing school. Claimant applied for Social Security disability and began receiving those benefits in June 2006.

The ALJ found that the claimant lacked credibility and had intentionally greatly exaggerated the extent of his disability. The ALJ further analyzed the evidence and concluded the evidence failed to support a finding that claimant's urological, balance or psychological problems were related to his electrical shock injury. The Board agrees.

Dr. Woltersdorf opined:

Test results indicate no cortical damage from the electrocution injury of 9-5-2000. There is evidence that Mr. Hart is not reporting his injuries in a genuine or straightforward fashion and this is likely malingering. He has no emotional complaints from the injury and denies same in interview and on objective emotional testing. His physical performance for upper extremity motor and sensory functions are in the normal range, except for the fine motor speed of the right index finger, which could discredit significant upper body impairment. There is no obvious impairments or disability across any of the domains or structures assessed during the evaluation. There are no reasons to limit activities or occupational pursuit for cognitive or emotional reasons. There is reason to suspect that Mr. Hart cannot be taken at face value when he reports a symptom. Medications should be re-evaluated if they have been prescribed based on patient report of symptoms in the absence of objective findings. The likelihood of abuse or addiction is probable here.¹

Dr. Wise agreed that claimant suffered no cortical damage from his electric shock injury. And from an emotional perspective, claimant expressed anger at his perceived current psychosocial and physical difficulties, he was not clinically depressed at a level requiring psychotherapeutic or psychopharmacological intervention.

Although Dr. Frieman concluded claimant suffered from depression and organic brain syndrome her opinion was predicated upon physical injury to the brain and the medical evidence did not support that conclusion. The Board, in this instance, finds Drs. Woltersdorf and Wise more persuasive and concludes the claimant did not suffer permanent psychological impairment as a result of his electrical shock injury.

¹ IME filed June 4, 2002.

In his brief to the Board the claimant conceded that it was likely that he had not met his burden of proof to establish that his delayed onset of incontinence and impotence were related to his electrical shock injury. Both Drs. Varghese and Devine agreed that such a delayed onset of those problems could not, within a reasonable degree of medical probability, be attributed to the electrical shock injury. The Board finds the electrical shock injury did not cause either claimant's incontinence or impotence.

The claimant's main problem after his electrical shock injury was a balance and gait problem as well as complaints of upper back pain. As noted, claimant initially improved with physical therapy. Thereafter the examining physicians noted claimant would voluntarily lose his balance on some tests and then have no difficulty getting up from the examination table or putting his pants back on. Moreover, it is interesting to note that the loss of sensation would cover different areas of his lower extremities during examinations with different physicians but the constant factor was that the loss of sensation did not follow dermatologic patterns.

Dr. Varghese concluded there was no objective evidence claimant suffered any permanent injury. The doctor noted there was no objective evidence of myelopathy or other spinal cord injury. The ALJ found Dr. Varghese's opinion more credible than that of Dr. Curtis. The Board agrees and concludes claimant did not suffer any permanent impairment of function as a result of his electric shock injury.

The Board disagrees with the ALJ's analysis that claimant is entitled to a work disability. Simply stated, claimant was injured, treated and ultimately released without restrictions by Dr. Kossow. Absent restrictions, the claimant did not meet his burden of proving he suffered either wage or task loss due to his injury. Accordingly, the ALJ's Award is modified to reflect claimant failed to meet his burden of proof that he suffered any permanent partial impairment as a result of his electric shock injury.

At the regular hearing the parties stipulated that claimant's average gross weekly wage would be equal to an amount that would calculate to a temporary total disability rate of \$371.67. The ALJ determined the claimant's average gross weekly wage was \$557.50. No evidence was presented regarding the value of employer provided health insurance nor the date such additional compensation was discontinued. The Board affirms the ALJ's determination that claimant's average gross weekly wage was \$557.50.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 29, 2007, is modified to reflect claimant has failed to meet his burden of proof that he suffered any permanent impairment as a result of his work-related electrical shock injury.

IT IS SO ORDERED.

Dated this _____ day of December 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
 Vaughn Burkholder, Attorney for Respondent and its Insurance Carrier
 Bryce D. Benedict, Administrative Law Judge